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# In the Supreme Court of the United States

OCTOBER TERM, 1951

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No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

LOUIS VISINTAINER

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

---

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review that portion of the judgment of the Court of Appeals for the Tenth Circuit which reverses the judgment of the Tax Court.

## OPINIONS BELOW

The opinion of the Tax Court (R. 15-23) is reported at 13 T.C. 805. The opinion of the Court of Appeals (R. 87-92) is reported at 187 F. 2d 519.

JURISDICTION

The judgment of the Court of Appeals was entered on March 10, 1951. (R. 92.) By order of Mr. Justice Clark, dated June 6, 1951, the time within which this petition might be filed was extended to and including August 7, 1951 (R. 93). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether, by transferring legal title to some of his business capital to members of his immediate family, a taxpayer may immunize himself from tax liability on part of his business income, the bulk of which is attributable to his services, while continuing to control and manage both the whole of the business and the business income.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 11. NORMAL TAX ON INDIVIDUALS.
>
> There shall be levied, collected, and paid for each taxable year upon the net income of every individual a * * * tax * * *.
> (26 U.S.C. 1946 ed., Sec. 11.)
>
> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or

> dealings in property, whether real of personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * *
>
> (26 U.S.C. 1946 ed., Sec. 22.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

> Sec. 29.22(a)-1. *What included in gross income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections 22(b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, * * *.
>
> * * * * *

STATEMENT

The facts as found by the Tax Court may be summarized as follows:

Since 1927, taxpayer has carried on a sheep ranching business. In the fall of 1942, the business assets included about 30,000 acres of ranch lands, leases of an additional 60,000 acres, about 6,000 ewes, and about 175 rams used for breeding

purposes. The profits of the business were derived from the sale of lambs and wool, and were attributable mainly to taxpayer's management of the business and care of the sheep. Taxpayer employed his brother-in-law (Reuse) as foreman of the ranch on a salary and profit-sharing basis. (R. 16-17, 19-20.)

In the fall of 1942, taxpayer undertook to make gifts of approximately one-third of the ewes to his four minor children, whose ages ranged from thirteen to six years. By a bill of sale dated October 7, 1942, he assigned each child "500 Cross-Bred Ewes with lambs and all increase." The assignments were recorded in the county assessor's office, and were reported in federal and state gift tax returns. Thereafter, the initial of the first name of the respective children was branded on five hundred of the ewes, with an oil paint stamping, and the children were told that they were being given these ewes. None of the rams used for breeding purposes was given to the children. The records of the business were kept by taxpayer's wife and, after the gifts, she set up a ledger account for each child with a credit entry of $5,000 ("500 head Sheep at $10.00"). (R. 16.) [1]

After the gifts, taxpayer managed the business as before, handling all of the sales of the wool and

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[1] While, as the Tax Court noted (R. 19), the taxpayer denied that tax avoidance was his chief motive in making the assignment to his children, he admitted that he was aware of the tax savings that were expected to be accomplished.

lambs and the purchase of new stock and supplies. (R. 17, 19.) All of the children were attending school during the taxable years and none of them worked regularly. The daughters were too young to be of much service in the business. During school vacations the son helped to take care of the sheep and did odd jobs, and received wages for some of his services. (R. 17-18.)

There never was any actual division of the donated sheep or of the lambs or wool which they produced. (R. 17.) Taxpayer continued to run the business as a unit, just as he had done before. (R. 19.) Shortly after the gifts, and on October 31, 1942, each child's ledger account was credited with $5,757.86, designated "Lamb Sales", and debited with $505.98 as two month's running expenses. (R. 16-17.) During 1943 and 1944, all of the proceeds from the sales of wool and lambs and all expenses of operation were apportioned among taxpayer, Reuse, and taxpayer's four children. The amounts allocated to the children were in proportion to the number of sheep donated to them. The shares of the receipts allocated to the children were credited to them in their ledger accounts, and in October of each year their accounts were charged with proportionate shares of the expenses, based on taxpayer's estimate of the total annual cost per head of running the sheep. The children's accounts were also charged with a proportionate part of the state and federal taxes. (R. 17, 19-20.)

The shares of income allocated to the children were deposited by taxpayer in his individual bank account. There has never been any segregation or payment to the children of the amounts credited to them, except that a $100 bank account was opened for the son in 1944, when he was sixteen years of age. From time to time government bonds were purchased for the children and charged to their several accounts. In 1948, a tract of grazing land was purchased in the son's name at a cost of $9,500, which was charged to his account. (R. 17, 19.)

Prior to 1942, taxpayer filed his returns on a calendar year basis. In that year, pursuant to permission granted by the Commissioner, he changed to a fiscal year ending October 31. For 1942 he filed a return for the short period January 1 to October 31, and for 1943 and 1944 he filed returns for the twelve months periods ending October 31. Separate returns were filed for the children for the same periods. For the period January 1 to October 31, 1942, taxpayer reported $30,331.60 as his share of the business profits, and each child reported $5,251.86. For the fiscal year ending October 31, 1943, taxpayer reported $22,797.54, and each child reported $2,871.49. For the fiscal year ending October 31, 1944, taxpayer reported $19,352.11, and each child reported $2,444.65. For the fiscal year ending October 31, 1945, taxpayer re-

ported $5,936.67, and each child reported $2,840.36. (R. 18.)

The Commissioner refused to recognize the gifts for federal income tax purposes, and included in taxpayer's gross income the shares of the business income reported by the children. (R. 5-13, 18.) The Tax Court, in a decision reviewed by the full court, unanimously held that the gifts effected no material change in the economic status of either taxpayer or the children, that taxpayer continued to earn the entire income, and that the arrangement produced nothing more than a reallocation of income in the family group. (R. 19-22.) Accordingly, it sustained the Commissioner's determination. (R. 23.) The Court of Appeals reversed. (R. 87-92.)

### REASONS FOR GRANTING THE WRIT

1. This case is typical of attempts by heads of families to achieve, by intra-family gifts of some or all of their business capital, assignments of their taxable business incomes unattainable through the medium of family partnerships erected upon such gifts. In the last few years, the Tax Court has time and again been confronted with such claims to relief from tax liability.[2] But it has consistently

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[2] *Nelson* v. *Commissioner*, 6 T.C. 764; *Werner* v. *Commissioner*, 7 T.C. 39; *Henson* v. *Commissioner*, 10 T.C. 491, reversed, 174 F. 2d 846 (C.A. 5); *Stanton* v. *Commissioner*, 14 T.C. 217, affirmed May 15, 1951 (C.A. 7) (1951 C.C.H. Tax Serv., par. 9290); *Bentley* v. *Commissioner*, 14 T.C. 228, affirmed *per curiam*, 184 F. 2d 668 (C.A. 2), certiorari denied, 340 U.S. 943; *Alexander* v. *Commissioner*, decided February 21,

rebuffed these attempts to reallocate income among the family members for tax purposes where the business continued to be controlled, as before the alleged gift, by the taxpayer, and the business income was a product of taxpayer's services alone or his services and the business capital in necessary combination.

The judgments of the Tax Court in these cases have been based on the theory that when income is a product of the taxpayer's services, or of his use of the business capital as distinguished from mere ownership, he remains taxable on that income. See *Werner* v. *Commissioner,* 7 T.C. 39. Or, as it was more recently put in *Stanton* v. *Commissioner,* 14 T.C. 217, 228:

> * * * the bare legal title to the property involved was not the essential element in the production of the income under the circumstances shown. The law is now well established that income is taxable to the person or persons who earn it and that such persons may not shift to another or relieve themselves of their tax liability by the assignment of such income, whether by a gift in trust or otherwise.[3]

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1950 (1950 P-H T.C. Memorandum Decisions, par. 50,040), pending on appeal before the Court of Appeals for the Fifth Circuit; *Visintainer* v. *Commissioner,* 13 T.C. 805, reversed, 187 F. 2d 519 (C.A. 10); *Simmons* v. *Commissioner,* decided August 9, 1946 (1946 P-H T.C. Memorandum Decisions, par. 46,198, affirmed in part and reversed in part, 164 F. 2d 220 (C.A. 5).

[3] In support of this proposition, the Tax Court cited, among other authorities, *Lucas* v. *Earl,* 281 U.S. 111; *Helvering* v. *Horst,* 311 U.S. 112; *Nelson* v. *Commissioner, supra,* and its decision in the case at bar.

"Where income flows from labor," the Tax Court said in its *Stanton* decision (14 T.C. at 225), "the issue is, Who 'earned' the income? *Commissioner* v. *Tower,* 327 U.S. 280; *Doll* v. *Commissioner,* 149 Fed. 2d 239; *Helvering* v. *Horst, supra; Lucas* v. *Earl, supra.* Where the income stems from combined labor and capital, the test is the personality who or which 'produced' the income. *Doll* v. *Commissioner, supra; Burnet* v. *Leininger,* 285 U.S. 136."

These principles have been consistently applied by the Tax Court; they have been given effect in cases involving gifts from husband to wife, gifts from father to child, and gifts from son to mother; they have been applied uniformly by individual Tax Court judges and in cases reviewed by the whole court. In the case at bar, for example, the decision was that of the full Tax Court and it evoked no dissent.

Though treated by the Tax Court as all of a piece, such of these cases as have reached the appellate courts have been met with a striking diversity of opinion. In *Stanton* v. *Commissioner, supra,* the Court of Appeals for the Seventh Circuit accepted the principles applied by the Tax Court and ruled that that court had correctly found that business income produced through the ability, skill, experience, acquaintanceship, personal clientele, and other personal characteristics and qualifications of the taxpayer-donor must remain

taxable to him notwithstanding his transfer of a portion of the business assets to members of his family. And in *Bentley* v. *Commissioner, supra,* the Court of Appeals for the Second Circuit felt impelled to do no more than enter a *per curiam* affirmance of the Tax Court's decision, which had rested on the Tax Court's decision in the case at bar, among others.

The approach of the Court of Appeals for the Fifth Circuit, in reversing the Tax Court in *Henson* v. *Commissioner,* 174 F. 2d 846, was quite different. That court there asserted that the "controlling question" is "not whether actual control over the property is exercised, but whether the right of control in fact exists; not who earns the income from such property, but who has the right to receive it." 174 F. 2d at 847.[4]

In the case at bar, the Court of Appeals for the Tenth Circuit followed the Fifth Circuit's ruling in the *Henson* case (R. 90). It rested its decision, as had the Fifth Circuit in *Henson,* on its view that the taxpayer here had made a *bona fide* gift of some of his business capital to his minor children and that that transfer of ownership resulted, for tax purposes, in a deflection of business income produced by the taxpayer's services or services and capital inextricably combined.

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[4] Compare the Fifth Circuit's ruling in *Simmons* v. *Commissioner,* 164 F. 2d 220, which, insofar as it reversed the Tax Court, foreshadowed the *Henson* ruling though it placed particular stress on the fact that the donor had transferred all and not merely some of his business capital to his wife.

It is plain enough from the above recital that there is a lack of concord among the courts of appeals on the principles here involved, and that some of the appellate courts are rejecting, as unsound, principles of law deemed well settled by the full Tax Court.[5] In these circumstances, review by this Court is essential to a fair and orderly administration of the revenue laws.

2. It is fundamental that income is taxable to him who earns it, and that an anticipatory assignment of income, whatever its formal cloak, is ineffective taxwise. These corollary principles are rooted in the doctrine that taxation is an intensely practical process, less concerned with legal formalities than with economic realities. They apply whether the income in question is derived from services (*Lucas* v. *Earl,* 281 U.S. 111; *Helvering* v. *Eubank,* 311 U.S. 122), or from property of which the donor remains the substantial owner (*Helvering* v. *Clifford,* 309 U.S. 331; *Commissioner* v. *Sunnen,* 333 U.S. 591; *Harrison* v. *Schaffner,* 312 U.S. 579; *Helvering* v. *Horst,* 311 U.S. 112; *Corliss* v. *Bowers,* 281 U.S. 376), or from a blend of both

[5] Other decisions of the courts of appeals, to the effect that an intra-family gift of income-producing property, unaccompanied by a shift of the economic benefits of ownership, does not insulate the donor from tax on the income, underline the divergency of views in the lower courts as to the proper guiding principles. See *Anderson* v. *Commissioner,* 164 F. 2d 870 (C.A. 7), certiorari denied, 334 U.S. 819; *Gouldman* v. *Commissioner,* 165 F. 2d 686 (C.A. 4); *Coffey* v. *Commissioner,* 141 F. 2d 204 (C.A. 5); *Tyson* v. *Commissioner,* 146 F. 2d 50 (C.A. 8); *Overton* v. *Commissioner,* 162 F. 2d 155 (C.A. 2).

sources (*Commissioner* v. *Tower,* 327 U.S. 280; *Lusthaus* v. *Commissioner,* 327 U.S. 293; *Commissioner* v. *Culbertson,* 337 U.S. 733). Where, as here, we are dealing with intra-family transactions, "special scrutiny of the arrangement is necessary" (*Helvering* v. *Clifford, supra,* p. 335), lest the tax incidence be shifted by "surface changes of ownership" (*Commissioner* v. *Culbertson, supra,* p. 746).

In this case, a father (taxpayer), the proprietor of a business whose income was derived from a combination of his capital and labor, made gifts of portions of the capital to his four minor children and ascribed to them shares of the net business income. The donated capital was left in the business, and was mingled with the other business assets. After making the gifts the taxpayer continued to manage and conduct the business as before, and to exercise complete dominion and control over the donated capital. (R. 16-17, 19.) He thus retained substantial ownership of the subject of the gifts, and parted only with titular ownership. Furthermore, in allocating the business profits between himself and the children, taxpayer made no effort to ascertain the portion attributable to his management and services, as distinguished from that attributable to capital.[6] Nor did he even at-

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[6] The business was that of sheep ranching, and its net income was derived from the sale of wool and lambs. (R. 17, 19-20.) Taxpayer handled all of the sales and the purchase of new stock and supplies (R. 17), and the Tax Court found

tempt to ascertain the portions attributable to the donated and non-donated capital, respectively.[7] Instead, the children were ascribed shares of the entire net business income (total receipts less estimated total expenses), inclusive of that derived from taxpayer's services and from his other capital. (R. 17, 19-20.) The arrangement thus served as a vehicle for deflecting to the children portions of the business income produced by taxpayer's services and the non-donated capital, in addition to that produced by the donated capital of which he remained the real owner. What is more, the shares of net income ascribed to and reported by the children were deposited in taxpayer's personal bank account and taxpayer alone decided on such small distributions to the children as were made in the taxable years (R. 17, 19). Taxpayer thus continued to enjoy control of the fruits, as well as of the property which he purported to give away. In the circumstances, the Tax Court unquestionably was justified in concluding that "in effect, if not in design, the whole arrangement was nothing

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that "The ranch profits were attributable for the most part to the management of the business as a whole and the care of the sheep" (R. 19). The children were attending school and performed no services of consequence. (R. 17-18.) There is no evidence that taxpayer deducted any compensation for his management and services in computing the net income which he allocated between himself and the children.

[7] The capital employed in the business included ranch lands, ewes, breeding rams, and supplies. (R. 15-16.) The children were given only a portion of the ewes (R. 16), and the total net income was divided in the ratio of the number of sheep owned (R. 17).

more than a reallocation of income in the family group" (R. 19), and that "it would require a complete disregard of the realities of the situation here to say that the income in dispute was earned not by the petitioner himself but by the children" (R. 20).

The court below reversed the Tax Court on the theory that a gift which is sufficient to vest "legal title" in the donee, and is not motivated by tax avoidance objectives,[8] is equally effective for federal income tax purposes notwithstanding that the donor retains control of both the property and the income therefrom. (R. 90-92.) In so holding, the court below misconceived the guiding principles. This Court has repeatedly held that a donor who retains command over the subject of the gift, or other economic benefits of ownership, remains the real owner for purposes of Section 22(a) of the Internal Revenue Code, *supra*. *Commissioner* v. *Sunnen*, 333 U.S. 591; *Helvering* v. *Clifford*, 309 U.S. 331; *Helvering* v. *Horst*, 311 U.S. 112; *Harrison* v. *Schaffner*, 312 U.S. 579; *Commissioner* v.

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[8] Although the court below professed to accept the Tax Court's findings (R. 87), it departed from them in assuming that tax avoidance was not a motive. The Tax Court found (R. 19), as taxpayer's testimony shows (R. 32-33), that tax saving was one of the motives underlying the gift. At any rate, the tax consequences flow from the economic substance of the arrangement, irrespective of the underlying motives; existence of a tax avoidance motive simply lends "further strength" to the Tax Court's conclusion that taxpayer earned the income. *Commissioner* v. *Tower*, *supra*, p. 289. See also *Helvering* v. *Clifford*, *supra*, p. 333; *Commissioner* v. *Culbertson*, *supra*, pp. 739-740.

*Tower,* 327 U.S. 280; *Commissioner* v. *Culbertson,* 337 U.S. 733. It is immaterial whether the gift is made in trust for the donee (*Helvering* v. *Clifford, supra*) or, as in this case, directly to the donee (*Commissioner* v. *Sunnen, supra*). Nothing in these decisions warrants the view, upon which the decision of the court below is founded, that the broad definition of gross income contained in Section 22(a) is to be circumscribed by refinements of legal title or by local law concepts of ownership. On the contrary, in the case of an intra-family transfer, care must be taken "lest what is in reality but one economic unit be multiplied into two or more by devices which, though valid under state law, are not conclusive so far as § 22(a) is concerned." *Helvering* v. *Clifford, supra,* p. 335. See also *Commissioner* v. *Tower, supra,* pp. 287-288.

The error of the court below is compounded by its failure to give any consideration to the fact that the income allocated to the children was not confined to that attributable to the donated capital, but included, as well, income attributable to taxpayer's services and to the non-donated capital (R. 19-20, 50). Even granting, *arguendo,* that there was a gift of certain of the business assets which sufficed to relieve the donor of tax on the income derived from those particular assets, the transfer cannot serve as a springboard for assigning to the donees the donor's taxable income from other sources.

3. If permitted to stand, the decision below will reopen a door to income tax splitting within the family group which, we believe, this Court meant effectively to close by its decisions in the *Tower, Lusthaus* and *Culbertson* cases. In those cases, this Court applied the *Earl-Clifford-Horst* principles to partnerships predicated upon intra-family transfers of business assets. In the *Tower* and *Lusthaus* cases, a transfer by a husband to his wife of a portion of his business capital was held ineffectual to render his wife a partner in a tax sense, despite the validity of the arrangement under state law and as to third parties. In the *Culbertson* case, involving a claimed father-sons partnership based in part upon a transfer of some of the capital to the sons, this Court reaffirmed the principles it had enunciated in *Tower* and *Lusthaus* and remanded the case to the Tax Court (p. 748) for a determination of whether the parties really intended to become partners during the taxable years, either because of the sons' services "or because of contributions of capital of which they were the true owners, as we have defined that term in the *Clifford, Horst,* and *Tower* cases?"[9] The rationale of this Court's decisions in *Tower, Lusthaus,* and *Culbertson* is that the Tax Court is not obliged to accord tax effect

[9] This Court pointed out (p. 747) that an intra-family gift of business capital might render the donee the true owner, and hence a true partner, if the donee exercises active "dominion and control" over the property, "and through that control influences the conduct of the partnership and the disposition of its income."

to a legally perfect family partnership arrangement which produces no substantial change in the creation of the business income, but merely a reallocation of it within the family. "The statutes of Congress designed to tax income actually earned because of the capital and efforts of each individual member of a joint enterprise are not to be frustrated by state laws which for state purposes prescribe the relations of the members to each other and to outsiders." *Commissioner* v. *Tower, supra,* p. 288; see also *Commissioner* v. *Culbertson, supra,* pp. 739-740.

Had taxpayer purported to make his six to thirteen-year old children his "partners" on the basis of the gifts in question, the Tax Court undoubtedly would have been justified, in the light of this Court's decisions in the family partnership cases and the record here presented, in refusing to recognize the children as the "true owners" of the donated capital for tax purposes. Yet taxpayer is here seeking to accomplish, by the gifts alone, a reallocation of his business income which he could probably not achieve through the device of a partnership predicated upon those very gifts. The court below, proceeding upon the premise that the arrangement "was in the form of gifts" and hence "must stand or fall as bona fide gifts rather than a family partnership" (R. 90), reached the anomalous result that a gift of business capital which would not suffice to render the donee the true

owner for partnership purposes does suffice if the parties refrain from executing a formal partnership agreement. To make the tax consequences turn upon such considerations is to exalt form above substance. Under the reasoning of the court below, the decisions of this Court in the family partnership cases would cease to have more than academic significance. All the taxpayer need do to circumvent the application of those decisions would be, in the words of the Tax Court (R. 21), to stop "one step short of the usual family partnership arrangement."

## CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
*Solicitor General.*

AUGUST, 1951.

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# In the Supreme Court of the United States

OCTOBER TERM, 1951

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## No. 219

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

LOUIS VISINTAINER, RESPONDENT

---

Answer of the Respondent to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circut.

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## QUESTION PRESENTED

Whether a father making a bona fide gift of income producing property to his minor child is taxable on the income therefrom even though he has possession and management of the gift property and its income during the child's minority.

## STATEMENT OF CASE

The statement of the facts of the case as set forth in the Petition is substantially correct with the significant excep-

tion of the allegation on lines 9, 10 and 11 of page 5 of the Petition wherein it is stated "there never was any actual division of the donated sheep or of the lambs or wool which they produced." That statement is a denial of the undisputed evidence in the case of the selection of each individual sheep and branding it with the initials of the donee and then turning it back into the band. (R 31, 73, 74). It also differs from the Circuit Court's fining (R 91) that "the sheep were not moved to another ranch or to other range; but they were singled out and branded with the identifying brands of the children."

## REASONS FOR DENYING THE WRIT

The Petition, under three headings, sets forth five reasons why the writ should be granted.

Those five reasons with the Respondent's reply to them, are as follows:

### 1. "THAT THERE IS A LACK OF CONCORD AMONG THE COURTS OF APPEAL ON THE PRINCIPLE HERE INVOLVED." (Petition p. 11).

The expected "lack of concord" was the Alexander case (Alexander vs. Commissioner, decided August 7, 1951, by the Fifth Circuit Court of Appeals) which came down after the Petition was filed. Instead of differing with the case at bar, the Court in that case cited it with approval, and in a unanimous opinion written by Justice Strum clarified the principle point of all cases of gifts of income producing property to children where the donor father retains possession by emphasizing "the distinction between management control over income producing property with the consent of the actual owners, and the absolute right of control over both the property and the income derived therefrom, which inheres in a valid legal title." The first situa-

tion prevailed in the Alexander case as it does in the case at bar and for that reason both the Fifth and the Tenth Circuit Courts have held the donor father not taxable.

There is further force to the distinction invoked from the fact that situations like this reflect a natural parental feeling which may be presumed to antedate the income tax.

The Fifth and Tenth Circuit Court are thus shown to be unanimously in accord.

The only other two cases which the Petition cites as in point and at variance with the case at bar are in the Second and Seventh Circuits respectively. They are BENTLEY VS. COMMISSIONER 14 T. C. 228 AFFIRMED PER CURIAM 184 F2d 668, CERTIORARI DENIED 340 U. S. 943 and STANTON VS. COMMISSIONER 14 T. C. 217 AFFIRMED MAY 15, 1951. Neither of these cases involved an absolute bona fide gift of income producing property and both cases were attempted partnerships in personal service businesses.

In the BENTLEY CASE, SUPRA, the Petitioners dissolved a corporation to avoid excess profits taxes and set up a partnership with their wives for the sole purpose of tax avoidance. The business was one of spare auto parts and is well described in the Tax Court's opinion, which states "it was a business which admittedly required a high degree of technical skill and specialized knowledge such as the Petitioners had always furnished and continued to furnish." "The company's major assets were never relinquished to any substantial degree, either with respect to formal title or to the use of assets." "Petitioners arrangement with their wives could be terminated at will." Under such a state of facts, there is no likeness to the facts in the case at bar, which was an unconditional, absolute, bona fide

gift of income producing property to the children of the Petitioner.

In the STANTON CASE, SUPRA, an attempt was made to transfer to a trust setup for the benefit of a wife and of a mother, the profits from a business which the Tax Court found were "produced by the concerted efforts of the five original members of the partnership through their unique knowledge, skill, experience and contacts in the industry." No gift of income producing property was involved and the whole transaction was an attempt to assign part of the income from a personal service business.

Both of the above two cases are in accord with the well recognized principle that the income from personal services is not assignable for tax purposes.

2. "THAT SOME OF THE APPELLATE COURTS ARE REJECTING AS UNSOUND PRINCIPLES OF LAW DEEMED WELL SETTLED BY THE FULL TAX COURT." (Petition p. 11).

It is true that at least three of the Circuit Courts of Appeal have recognized the right of a donor to remain in control of a gift without impairing the validity of the gift or the rght of the donee to the income therefrom. Those are the Fifth, Eighth and Tenth Circuits as illustrated in the following cases:

Hensen vs. Commissioner, 10 T. C. 491, Reversed 174 F (2d) 846. Fifth Circuit.

Alexander vs. Commissioner, (Supra). Fifth Circuit.

Edson vs. Lucas, 40 F (2d) 398. Eighth Circuit.

Visintainer vs. Commissioner, 13 T. C. 805 Reversed 187 F. (2d) 519. Tenth Circuit.

All of the above decisions were by unanimous Courts and all of them reversed the Tax Court.

So far as known no Circuit Court of Appeals has held differently. Furthermore, all three Circuit Courts have set out their reasons for differing with The Tax Court in all of the above cases and so far The Tax Court has never commented upon or replied to the reasoning upon which all of the above decisions are based.

3. "TAXPAYER THUS CONTINUED TO ENJOY CONTROL OF THE FRUITS, AS WELL AS OF THE PROPERTY WHICH HE PURPORTED TO GIVE AWAY." (Petition p. 13, lines 17, 18 and 19).

This is a denial of the undisputed evidence in the case which showed that the taxpayer retained only a managerial control. As was said in the ALEXANDER CASE, SUPRA, "the father was aiding the son in building up a business for himself which would ultimately make him a productive and independent adult citizen, a practice neither unusual, unnatural, nor evasive but commendatory."

4. "TAXPAYER MADE NO EFFORT TO ASCERTAIN THE PORTION ATTRIBUTABLE TO HIS MANAGEMENT AND SERVICES AS DISTINGUISHED FROM THAT ATTRIBUTABLE TO CAPITAL." (Petition p. 12, lines 1, 2, 3 and 4 from the bottom).

The earnings in the case at bar came exlusively from the sale of wool grown on the backs of the gift sheep and lambs produced by those female gift sheep. Each child owner paid its fair proportion of herder, foreman, feed, pasture and other expense. The mother did all the bookkeeping without compensation. The father's supervisory duties

were no heavier than that of a father reviewing a portfolio of securities he has given his child. To quote the ALEXANDER CASE, SUPRA, again, "we find in the father's vicarious management of the property for his son nothing which justifies visiting the tax consequences of the enterprise upon the father as the "earner" of the income."

5. "IF PERMITTED TO STAND, THE DECISION BELOW WILL REOPEN A DOOR TO INCOME TAX SPLITTING WITHIN THE FAMILY GROUP." (Petition p. 16, lines 1, 2 and 3).

If undue tax splitting results from the construction of the revenue laws given by the Courts, then it becomes the duty of Congress to amend such laws. It is not within the province of the Courts to attempt such reforms.

## CONCLUSION

No diversity is shown between the Appellate Courts on this question. Three Circuits are in accord and the harmony is unanimous. There is no reason for denying a father the right to make bona fide gifts of income producing property to his children, nor for penalizing him for caring for the gift property during the child's minority.

The Writ should be denied.

Respectfully submitted,

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